Dwellinghouse extension - loss of light to adjacent property

Case Comment

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Planning

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Cases cited
Brewer v Secretary of State for the Environment [1988] 2 P.L.R. 13; [1988] 1 WLUK 35 (DC)

J.P.L. 480 Planning permission for an extension to a dwelling-house was refused by the council on the ground that its close proximity to two flank windows of the adjoining bungalow would substantially reduce the light in the lounge and affect the amenities of the occupiers. An appeal by written representations was determined by an Inspector, who having inspected the site, concluded that the identified loss of amenity was insufficient to constitute a specific planning objection to the extension. He was influenced by the fact that a light obstruction notice under section 2 of the Rights of Light Act 1959 had been applied for against the adjacent bungalow, and the occupiers had not sought to contend for a right to light for the flank wall.

The applicants, owners of the adjacent bungalow appealed under section 245 of the 1971 Act to quash the Inspector's decision.

J.P.L. 481 MR. DAVID WIDDICOMBE, Q.C. said that the light obstruction notice referred to by the Inspector in his decision letter was a notice registered under section 3 of the rights of Light Act 1959. By section 2(1) of that Act it is provided:

"For the purpose of preventing the access and use of light from being taken to be enjoyed without interruption, any person who is an owner of land (in this and the next following section referred to as the "servient land') over which light passes to a dwelling-house, workshop or other building (in this and the next following section referred to as the "dominant building') may apply to the local authority in whose area the dominant building is situated for the registration of a notice under this section."

Section 3(1) deals with the effect of a registered notice and proceedings relating thereto and provides:

"Where, in pursuance of an application made in accordance with the last preceding section, a notice is registered thereunder, then, for the purpose of determining whether any person is entitled (by virtue of the Prescription Act 1832, or otherwise) to a right to the access of light to the dominant building across the servient land, the access of light to that building across that land shall be treated as obstructed to the same extent, and with the like consequences, as if an opaque structure, of the dimensions specified in the application, (a) had, on the date of registration of the notice, been erected in the position on the servient land specified in the application, and had been so erected by the person who made the application …"

A registered notice, therefore, determined that there were no rights of light attaching to a property and also, as long as it was in force, prevented rights of light being acquired by prescription. In this case, Mr. and Mrs. Brewer admitted that they had no rights of light and had not contested the notice.

Mr. Tait, for the Brewers, contended that the Inspector in paragraph 5 had taken into account an irrelevant consideration, *namely, the absence of private rights of light*. He said it would have been equally wrong if there had been rights of light for the Inspector to have taken their existence into account. He submitted that generally speaking, the legal status of land and private rights over land was irrelevant for planning and instanced restrictive covenants and easements such as rights of way. He cited the following cases: *Ashbridge Investments Ltd.* v. *Minister of Housing and Local Government* [1965] 1 W.L.R. 1320; *Seddon Properties*

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Ltd. and Another v. *Secretary of State for the Environment* (1981) 42 P. & C.R. 26; *Stringer* v. *Minister of Housing and Local Government and Others* [1971] 1 All E.R. 65; *Westminster City Council* v. *Great Portland Estates plc* [1985] A.C. 661 and *E.C. Gransden & Co. Ltd. and Falkbridge Ltd.* v. *Secretary of State for the Environment and Gillingham Borough Council* (1987) J.P.L. 365.

Mr. Vallance, for the Secretary of State, said that private amenity as, for instance, between adjoining dwellings could be a planning matter. Where such amenity was the issue, it was legitimate to take into account the absence or otherwise of private rights, albeit such rights taken on their own were not perhaps a material consideration. They could be taken into account, he said, as part of "the mix" going to a planning judgment.

Mr. Elvin, for the owner of No. 92, supported Mr. Vallance. He drew attention to the history of the matter. It appeared that No. 90 had been extended some years ago before ***J.P.L. 482*** the time of the Brewers without objection by the owner of No. 92. He said that the Inspector was entitled to take the absence of rights of light into account in assessing the strength of the objection made by a neighbour to the effect of a proposal on his amenities.

He (David Widdicombe, Q.C.) had no hesitation in accepting the argument of Mr. Tait. Planning was concerned with land use from the view point of the public interest and as a generality it was not concerned with private rights as between landowners. An applicant for planning permission did not have to have an interest in the land the subject of the application. Nor, for instance, was it relevant to the determination of an application for planning permission for land that a private right of way existed across that land or that there was a restrictive covenant prohibiting the use applied for. There might be exceptional cases where private rights were relevant. One example was the imposition of conditions on planning permission in respect of land "under the control" of an applicant. But in his judgment the absence of private rights of light was not a relevant planning consideration in the present case. Equally, if the Brewers had had private rights of light, that would not have been relevant.

He did not accept the argument that such private rights could be relevant as part of what Mr. Vallance called "the mix" or merely as a matter going to weight. If private rights were a relevant consideration in cases such as this, it might be necessary for an Inspector to determine in a contested case whether such rights existed. He did not believe Parliament, in enacting the planning legislation, intended such matters, which could be of great complexity, to be determined on a planning appeal.

He therefore allowed the appeal and quashed the Inspector's decision.

Comment. In many ways the system of public control of development provides an alternative to the private law as a means of protecting the amenities of individuals. This is done in the name of the public interest and not the individual property owner but as Cooke J. put it, in *Stringer* v. *Minister of Housing and Local Government* [1970] 1 W.L.R. 1281, "The public interest, as I see it, may require that the interests of individual occupiers should be considered. The protection of the interests of individual occupiers is one aspect and an important one of the public interest as a whole." In this regard, the control afforded by the need for planning permission is far wider than the law on nuisance or rights to light, as permission could be refused because of perceived damages to amenities, even if there was no possibility to bring any action in private law.

It would therefore have undermined the whole system of development control, if David Widdicombe, Q.C. had accepted that the absence of private law remedies was a material factor.

On the other hand, it is worth noting that in *Fitzpartick Developments Ltd.* v. *Minister of Housing and Local Government* (1965) 194 E.G. 911, Widgery J. accepted that the *existence* of private law remedies could be a material consideration. In that case the local planning authority had refused permission for seven houses to be built near a saw-mill. Widgery J. held that the Minister on appeal was required to have regard to all the relevant circumstances and "… one could not shut one's eyes to the fact that certain rights existed at common law and by statute." It was therefore relevant that the law of nuisance could be used to require the damage to amenities from the saw-mill to be reduced and was a material consideration in favour of granting permission. So planning can be concerned with the private law rights as between landowners when these can be used to make an existing neighbouring use more compatible to a proposed use.

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